BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

To: The Commission

OPPOSITION OF TIME WARNER ENTERTAINMENT COMPANY, L.P. TO PETITION FOR RECONSIDERATION

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Date: June 16, 1994

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Pursuant to 47 C.F.R. § 1.429(f), Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, hereby opposes the Petition for Reconsideration and Clarification ("Petition") of certain aspects of the Commission's Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking ("Second Reconsideration")[1] and its Third Order on Reconsideration ("Third Reconsideration"),[2] filed by the National Association of Telecommunications Officers and Advisors, et al. ("NATOA"). NATOA has failed to raise any facts which have

[1] Second Reconsideration in MM Docket 92-266, 74 RR 2d 1077 (rel. March 30, 1994).

[2] Third Reconsideration in MM Docket 92-266, 74 RR 2d 1274 (rel. March 30, 1994).

occurred or any circumstances which have changed since the Commission adopted its Third Reconsideration. Accordingly, the Commission must deny NATOA's petition.[3]

NATOA argues that the Commission should not permit cable operators to advertise franchise fees as a charge separate from basic and cable programming service tier rates. NATOA claims that such advertising would violate the intent of Section 622(c) of the Cable Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 47 U.S.C. § 542(c), and 47 C.F.R. § 76.985, which essentially codifies Section 622(c) of the 1992 Cable Act in the Commission's rules.

NATOA made identical arguments in its Comments filed in this proceeding on January 27, 1993. The Commission rejected those arguments in its Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5970-73 (1993) ("Report and Order"), and again in the Third Reconsideration, 74 RR 2d 1274, ¶¶ 142-44. The only change the Commission made in the Third Reconsideration was to add Section 76.946 to the rules to clarify the evident confusion reflected in the petitions for reconsideration of the Report and Order over the advertising of

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[3]NATOA seeks reconsideration of four aspects of the Commission's Second and Third Reconsiderations in MM Docket 92-266. While not conceding the validity of NATOA's other three arguments, Time Warner is only addressing NATOA's objection to the advertising of franchise fees in this Opposition.

rates. The addition of that section did not embody any change from the conclusions in the Report and Order.

The purpose of Section 622(c) is unambiguous: it is "to ensure public disclosure of costs imposed on the cable operator by specific forms of regulation, so that subscribers can understand what portion of their cable bill or rate increase results from certain types of governmental assessments beyond the cable company's control."[4] What Congress did not want is for cable operators to send a separate bill to customers for franchise and other governmentally imposed fees.[5] As long as the customer may remit a single periodic payment for cable service, Section 622(c) permits the cable operator, as the Commission has found, both to itemize governmental fees on the bill as one or more separate line items and to advertise governmental fees separately. If the cable company cannot advertise governmental fees to potential subscribers, then the right to itemize (i.e., "identify . . . as a separate line item on each regular bill" in the words of the statute) becomes a hollow right indeed. In either case, both the right to advertise and the right to control the content of the bill are reserved to the firm providing the service and billing the customers for it, not to the government.[6]

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[4]Report and Order, 8 FCC Rcd at 5970-71 (footnotes omitted).

[5]Id. at 5972-73.

[6]See Pacific Gas & Elec. v. PUC of California, 475 U.S. 1 (1986).

NATOA quotes extensively from the House Committee Report, H.R. Rep. No. 628, 102d Cong., 2d Sess. 86 (1992), in support of its position. NATOA continues to ignore the fact that Congress adopted the Senate, not the House, version of Section 622(c).[7] In any event, there is no basis for inferring from legislation dealing with the format of a subscriber's bill an effort to control the format, not to mention the content, of advertising. Advertising is protected commercial speech under the First Amendment. Neither Congress nor the Commission nor a local franchising authority may interfere with the advertiser's freedom of commercial speech except under limited circumstances not present here.[8] Congress did not attempt to intervene in the advertising decisions of cable operators, despite the otherwise pervasive nature of cable regulation. The Commission has no implicit authority to do so either.

NATOA makes much of the Commission's footnote giving an example of the way an advertisement might display the cost for

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[7]The statutory language is clear and unambiguous: it refers only to the line items on a subscriber's bill. In such circumstances the statute is not to be expanded or contracted by statements of individual legislators or committees during the course of the enactment process. Green v. Bock Laundry, 490 U.S. 504 (1989).

[8] The First Amendment protects commercial speech -- advertising -- from unwarranted government regulation provided that the speech concerns lawful activity and is not misleading. When government does regulate commercial speech, it must use the least restrictive means available and must narrowly tailor its regulation to achieve the desired objective. See Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980).

basic service and the franchise fee.[9] However, NATOA is attempting to confuse the issues of subscriber bill itemization and advertising of rates with the issue of computation of the amount of the franchise fee payable to the franchising authority. The computation of franchise fee payments is governed by the local franchise agreement and by Section 622 of the 1984 Cable Act, 47 U.S.C. § 542. It is not uncommon for franchise fees to include payments based on revenues received from sources other than cable subscription revenues, such as advertising or leased channel revenue. The itemized amount appearing on the subscriber's bill in no way prejudices the amount of the franchise fee that the cable operator is bound by statute and contract to pay. Thus, NATOA's claim is simply wrong that allowing cable operators to itemize franchise fees, as expressly authorized by the statute, somehow "would deny franchising authorities the right to assess franchise fees on a cable operator's total gross revenues."[10]

As cable operators continue to expand their service offerings to provide additional choices to consumers, the associated rates for such service and package options will proliferate as well. If cable operators serving multiple communities were required to advertise separate rate schedules for each community based solely on differences in the franchise fee, cross-franchise area marketing efforts would be virtually

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[9]Third Reconsideration, 74 RR 2d 1274, ¶ 143 n.99.

[10]Petition at 12.

impossible. Moreover, consumer confusion would result. In addition, NATOA's approach would make it more difficult for consumers to participate in the Commission's rate regulation process.

For example, assume that Form 1200 results in a basic rate of $15.00. Because franchise fees are entirely external to the FCC benchmark process, the cable operator is allowed to charge a "total bill" to the basic customer of $15.00 plus any applicable franchise fees. If the cable operator were to advertise the rate inclusive of franchise fees, the advertised rate would not equal the Form 1200 rate. The Commission's "fee plus" approach to advertising of cable rates is the only reasonable solution.

WHEREFORE, Time Warner respectfully urges the Commission to deny the Petition for Reconsideration filed by NATOA, et al.

Respectfully submitted,

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June 16, 1994
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CERTIFICATE OF SERVICE

I, Susan B. Crawford, do hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration was served by U.S. mail, first class postage prepaid, on June 16, 1994 to:

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